INDEX

Subject Index

	Page
Motion to affirm on behalf of New Haven Chamber of Commerce, Intervenor	1
Introductory Statement	1
1. Proceedings Below	1
Preliminary Statement	2
I. Interest of Intervenor	2
II. Interstate Commerce Commission's Findings and Decision	3
III. Decision of Court Below	5
IV. Questions Presented	6
(A) Rates Not In Issue	7
(B) The Requirements of the Administrative Procedure Act Have Been Met In the Commission's Findings	9
(C) National Defense—Affirmative Finding in Instant Proceeding Not Essential to Validity of Commission's Order	11
(D) There Is No Inconsistency in the Commission's Decision in the Isbrandtsen Case With the Decision In the West Coast Trans-Oceanic Case	13
Conclusion	14

Table of Cases Cited

Alabama Great Southern R. Co. v. *United States*, 340 U.S. 216, 288	11
Atlanta-New Orleans Motor Freight Co. et al. v. *United States of America et al.*, 10 F.C.C. 2085 at 2087; Northern District of Georgia, Atlanta Division, 1953	8

Page

Cantlay & Tanzola, Inc. v. *United States*, 115 F. Supp. 72 (S.D. (Cal.) 12
Coyle Lines Incorporated, et al. v. *United States of America, et al.*, 115 F. Supp. 272 at 275, 276, 278 ... 9, 10
Pan-Atlantic S.S. Corp. Extension—Houston, 285 I.C.C. 33, 48-49 4
Universal Camera Corporation v. *Labor Board*, 340 U.S. 474, 488 10
West Coast Trans-Oceanic Steamship Line, 285 I.C.C. 381 13

STATUTES AND OTHER AUTHORITIES CITED

Administrative Procedure Act, 5 U.S.C.A., Sec. 1007 (b) 11
Administrative Procedure Act, Section 8 (b) 7
Administrative Procedure Act Section 10 (e) 10
Interstate Commerce Act, Part II, Sec. 216 (g), 49 United States Code, 316 (g) 3
Interstate Commerce Act, 49 U.S.C.A. 909 (c) 6, 11
United States Code, Title 49, Section 905 8
United States Code, Title 49, Section 907 8

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 90-130

LUCKENBACH STEAMSHIP COMPANY, INC.,
Plaintiff,

against

THE UNITED STATES OF AMERICA, ET AL.,
Defendants

MOTION TO AFFIRM ON BEHALF OF NEW HAVEN CHAMBER OF COMMERCE

Introductory Statement

1. *Proceedings Below*

On December 3, 1951, Isbrandtsen Company, Inc. filed an application with the Interstate Commerce Commission for a certificate of public convenience and necessity to serve in intercoastal traffic as a common carrier by water, from Pacific coast ports to North Atlantic ports via the Panama Canal in a one-way eastbound operation. Evidence was taken at hearings before a Commission Examiner who issued a recommended report and order granting the application. The Commission, Division 4, sitting with three Commissioners, one dissenting, held that public convenience and necessity required the issuance of the certificate. The

entire Commission denied Plaintiff's application for rehearing and reconsideration and affirmed the decision of Division 4. Plaintiff instituted action in the District Court for the Southern District of New York to enjoin and set aside the decision and order of the Commission. The District Court issued its decision dismissing the complaint and dissolving the stay. On January 29, 1954, final judgment was entered, which judgment is appealed by Plaintiff to this Court. Pursuant to Rule 12, Paragraph 3 and Rule 7, Paragraph 4 of the Rules of the Supreme Court of the United States, this motion to affirm is made on the basis that the questions presented by Plaintiff's appeal are so unsubstantial as not to require further argument.

Preliminary Statement

I. *Interest of Intervenor*

Intervenor, New Haven Chamber of Commerce, appeared in this action in support of the applicant Isbrandtsen before the Interstate Commerce Commission. This Intervenor introduced testimony before the Interstate Commerce Commission with respect to the need for intercoastal steamship service from west coast ports to the port of New Haven. The interest of Intervenor is wholly and solely with respect to shippers and receivers of freight using the port of New Haven for distribution to points in Connecticut and western Massachusetts. This Intervenor has no private interest in either applicant Isbrandtsen or protestant Luckenbach as such, nor has it any self serving financial interest in either protestant or applicant. The interest of this Intervenor is that of public interest as contrasting to the private interests of existing carriers.

The New Haven Chamber of Commerce sought service to the port of New Haven and, motivated by that need it supported the application of the Isbrandtsen Lines which

offered to provide such service subject, necessarily, to obtaining authority from the Interstate Commerce Commission.

II. *Interstate Commerce Commission's Findings and Decision*

The Commission found from the evidence presented before it that the port of New Haven does not presently have any intercoastal carrier service although shippers have sought such service and requested the same from the Plaintiff.

The Plaintiff opposes the application of Isbrandtsen while refusing to serve the port of New Haven and shippers in the area which the port of New Haven serves as a distribution area, namely, the State of Connecticut and Western Massachusetts.

> (a) "More than 30 witnesses representing shippers, chambers of commerce, port organizations, and other interests testified in behalf of the proposed service. With the exception of a witness for the National Wool Growers Association and the National Wool Marketing Corporation, a witness for a manufacturer of electrical equipment and one for a manufacturer of washing compounds, the shipper witnesses represented packers and distributors of canned vegetables and fruits and other food products produced on the Pacific coast, princially in the State of California. In addition to the interested shippers, there appeared terminal companies, chambers of commerce, and other organizations in support of the establishment of the proposed service at the Port of Richmond and Port Hueneme on the Pacific coast and the Port of New Haven on the Atlantic coast * * *" (Commission's Decision Page 374-5).
>
> (b) "The port of New Haven presently is not served by intercoastal carriers although shippers have asked for this type of service. There is a large area tributary to the port that would benefit from the proposed service

in the form of lower transportation costs, the port having adequate facilities that could be used for this purpose. Several shippers, as well as various port and other organizations, support the establishment of this service. Applicant's estimate that approximately 1,500 tons per vessel would move through this port is supported by the evidence adduced by the interested shippers. This tonnage is presently moving through the ports of New York and Boston" (Commission's Decision Page 375).

Concerning Plaintiff's claim that the port of New Haven is adequately served through the ports of New York and Boston, the Commission found:

(c) "The protestants oppose applicant's proposed service to the port of New Haven on the ground that the shippers and receivers of freight are now adequately served through the ports of New York and Boston, and that no additional traffic is being added. In *Pan-Atlantic S. S. Corp. Extension—Houston,* 285 I. C. C. 33, 48-49, division 4 said:

> We are constrained, also, to agree that shippers at or adjacent to ports other than New York are entitled to service through the ports to which they are logically tributary, if such service is economically feasible.
>
> The volume of cargo shippers indicate would be available removes any doubt concerning the question of whether the service would be economically feasible. Although the proposed service would divert traffic from the certificated carriers, serving New York and Boston, such diversion, there being no other reason, should not deprive the port of New Haven of a new and improved service" (Commission's Decision Page 375-6).

The Commission also gave consideration to the effect upon existing carriers of the issuance of a certificate to Isbrandtsen to service the port of New Haven as weighed

against the public interest of the shipping and receiving public. It found a need for service of east bound tonnage and that based upon the evidence in the record such need for east bound service could be met by the granting of the certificate to Isbrandtsen, due to the nature of its world-wide service.

> (d) "* * * Since there appears to have been a substantial eastbound tonnage (general cargo, including lumber) available for the added ships during the period of their operation, it is apparent that the lack of westbound cargo has a material effect on the decision of the protestants to withdraw the added ships from the trade * * *" (Commission's Decision Page 378).
>
> (e) "It is evident that the proposed service will not increase to any appreciable extent the volume of traffic moving in intercoastal service. If the proposed service is authorized, applicant would necessarily have to share some of the existing traffic with the certificated carriers. Although some of the latter carriers would suffer a loss of traffic, the shippers would gain a more frequent service or at least a greater amount of cargo space, for which they have shown there is a need during the period August through February * * *" (Commission's Decision Page 378).
>
> (f) "* * * Since the unbalance in eastbound and westbound volume of cargo will no doubt continue into the foreseeable future, any improvement in intercoastal service will have to be accomplished by service of the nature proposed by applicant" (Commission's Decision Page 378).

III. *Decision of Court Below*

1. The Court below, in a decision written by Augustus N. Hand, Circuit Judge, reviewed the findings of the Commission and after a complete discussion of the issues raised by the Plaintiff against the validity of the Commission's

order, held that the Commission had made the essential and ultimate findings required by law. The Court held:

> "• • • The ultimate findings required by law are only that the applicant is fit, willing and able to perform the proposed service and that the service will serve the public convenience and necessity, 49 U. S. C. 909(c). Such findings were made here • • •" (Decision of Court below, Page 4).
>
> "• • • However it seems equally clear that the Commission can not and should not be required to discuss each consideration expressed in the National Transportation Policy in every decision it renders. '(T)he basic findings essential to the validity of a given order will vary with the statutory authority invoked and the context of the situaiton presented.' Alabama Great Southern R. Co. v. United States, 340 U. S. 216, 288. It is only necessary that the essential basis of the Commission's order appear in the report so that a court can satisfy itself that the Commission has performed its function • • •" (Decision of Court below, Page 5).

IV. *Questions Presented*

The Plaintiff in this action concedes that "The report of the Interstate Commerce Commission appears reasonable and intelligible on its face. It is not Luckenbach's position that the Commission failed to make findings of fact or that it failed to give rational reasons for its action" (Statement as to Jurisdiction, Page 2).

Again, at Page 16 of the Statement of Jurisdiction:

> "Nor is this a case in which the Commission does not sufficiently explain the basis of its action. We agree that within its four corners the Commission's report presents an intelligible and rational basis for its decision. • • •"

Plaintiff claims, however, that the Interstate Commerce Commission committed an error in failing to comply with

the requirements of Section 8(b) of the Administrative Procedure Act, and that the Commission, pursuant to the requirements of Section 8(b), failed to give its "reasons or basis—upon all the material issues of fact, law or discretion presented on the record".

In particular, Plaintiff alleges error of the Interstate Commerce Commission in (A) excluding evidence of rate cutting practices by an applicant for a certificate of public convenience and necessity, (B) arbitrary and capricious action by the Commission based on an alleged inconsistency by the Commission in its decision in West Coast Trans-Oceanic Steamship Line, 285 I. C. C. 381 decided one day before the instant case, and (C) in failure to make a specific finding as to the issue of national defense pursuant to the National Transportation Policy of the Interstate Commerce Act.

It it well established by numerous precedents and decisions of the courts that a decision of the Commission will be sustained by the courts if it is found that there is substantial evidence in the record for the findings of the Commission; and if it is further found that the Commission has made the basic findings of fact required by the statute. The Commission is not required to make atomized and detailed findings of fact upon each and every issue claimed by the parties to the proceedings before it. It is charged only with making basic findings essential to the validity of a given order. Here, the Commission found that public convenience and necessity required the institution of service by the Isbrandtsen Lines.

(A) Rates Not in Issue

The Plaintiff attacks the order of the Commission, claiming that the Commission's report did not contain a statement upon the material issue of "the threat of unfair com-

petition inherent in the proposed service of Isbrandtsen". They further claim that "Luckenbach sought to prove that Isbrandtsen has and would cut rates, but the Commission excluded such testimony without giving any reason" (Statement as to Jurisdiction, Page 9).

In deciding whether public convenience and necessity require the proposed operation, the question of rates is not in issue. The remedy, if any be needed, for the alleged condition is provided for in the Act (U. S. Code Title 49, Section 907).

The issue involved before the Commission was the need and convenience of the shipping public for intercoastal east bound water service. The applicant is not called upon, and cannot establish any rates for this service until its certificate is issued. Once the certificate is issued, it is bound by statute to publish and file a tariff setting forth its specific rates and charges (U. S. Code Title 49, Section 905).

These rates and charges must meet the standards set up by the Act which provides the method of relief in a proper proceeding brought before the Commission in the event of complaint concerning such charges; either as being unduly low, or unreasonably high. The Commission, in a proceeding involving public convenience and necessity, cannot assume that the rates of competing carriers are those which the Commission might approve, nor that the proposed rates of applicant, which rates have not been published and are not effective, do not meet the required standards.

Atlanta-New Orleans Motor Freight Co. et al. v. *United States of America, et al.*, 10 F. C. C. 2085 at 2087; *Northern District of Georgia, Atlanta Division*, 1953:

> "• • • It is quite true, as complainants contend, that if the only complaint that the shippers (certain textile mills) had as to existing services concerned the matter of rates, there was available to them an administrative remedy whereby they could seek a change in such rates

(see Interstate Commerce Act, Part II, Sec. 216(g), 49 United States Code, 316(g)."

Coyle Lines Incorporated, et al. v. *United States of America, et al.*, 115 F. Supp. 272 at 278:

"• • • The railroads' argument is predicated on the assumption that the only reason the Commission granted the new certificate was to keep Gulf-Canal in an unprofitable business which competes with the railroads. As shown above, the Commission found a need for a water carrier which would provide less than bargeload as well as bargeload service along the Intracoastal Canal and that Gulf-Canal's proposed service would meet this need. If the railroads feel that Gulf-Canal or any other water carrier is angling its rates to operate at a loss where competition with railroads exists, the matter can be brought to the attention of the Commission in a proper proceeding."

Refering to the claim of unfair competitive practices by Isbrandtsen because it is engaged in unregulated foreign trade, the Court found in the instant case:

"• • • There is no evidence to show that this has resulted in unfair competitive practices. Thus, where the issue raised does not seem of manifest importance and the Commission has indicated that it has considered it, we do not think it wise or necessary to protract the litigation further by remanding the order for more explicit and seemingly useless discussion" (Decision of Court below, Page 8).

(B) *The Requirements of the Administrative Procedure Act Have Been Met in the Commission's Findings*

It is not necessary for the Commission to make a detailed atomized finding as to each and every incidental phase of the proceeding before it, or as to each and every objection raised by protestant. If the Commission has made the basic

findings required by the Act, it has met the requirements of the Administrative Procedure Act.

This principle has been determined by numerous decisions of the Courts. In *Coyle Lines Incorporated, et al.* v. *United States of America* cited *supra*, at Pages 275, 276:

> "Section 10(e) of the Administrative Procedure Act relating to judicial review of administrative agency actions provides that the reviewing court shall 'hold unlawful and set aside agency action, findings and conclusions found to be * * * (5) unsupported by substantial evidence * * * In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party * * *.' * * *"

The District Court, citing the Supreme Court in *Universal Camera Corporation* v. *Labor Board*, 340 U. S. 474, 488, then stated:

> "It is now clear, therefore, that orders of administrative agencies are to be enforced only when such orders have a rational basis in adequate findings which are supported by substantial evidence on the record considered as a whole. It is further true, however, that the court may not substitute its judgment for the judgment of the agency which, under the law, is presumably equipped by experience to deal with matters coming within the orbit of its expertise. A court exceeds its function when it attempts to weigh the evidence or to determine the credibility of the witnesses. The court's function is at an end when it determines that the findings of the agency are, or are not, supported by substantial evidence on the record considered as a whole.
>
> Plaintiffs first make the contention that the Commission has made insufficient findings on which to predicate its ultimate conclusion, as required by accepted standards of judicial and quasi-judicial procedure and specifically by the Administrative Procedure Act. Sec-

tion 8(b) of the Administrative Procedure Act, 5 U. S. C. A. Sec. 1007(b), requires that in agency proceedings such as the one now under review 'All decisions • • • shall • • • include a statement of (1) findings and conclusions as well as the reasons or basis therefor, upon all material issues of fact, law, or discretion presented on the record • • •.'

The Commission here made its ultimate or quasi-judicial findings in the terms of the Act which authorizes issuance of a certificate of public convenience and necessity when it is found 'that the applicant is fit, willing and able to perform the service proposed • • • and that the proposed service is or will be required by the present or future public convenience and necessity.' 49 U. S. C. A. Sec. 909(c). In addition, the Commission, Division Four, filed a lengthy opinion setting out the facts in detail as well as the considerations which led to its ultimate conclusion. • • •

From these findings and the evidence which supports them it is clear that 'Enough has been 'put of record' to enable us to perform the limited task which is ours.' *Alabama Great Southern Railroad Co., et al., v. United States,* 340 U. S. 216 • • •. Section 8(b) of the Administrative Procedure Act does not require detailed or numbered findings of every subsidiary evidentiary fact. • • •"

(C)—*National Defense — Affirmative Finding in Instant Proceeding Not Essential to Validity of Commission's Order.*

Judge Augustus N. Hand stated in the decision of the lower court:

"In contrast the record here discloses that the issue of national defense was not raised below. Nor is it clear that there is any substantial interest of national defense involved or violated. The need for the proposed service was established and in the 'context of the situation presented' we do not think an affirmative

discussion of national defense was necessary to validate the order."

(Decision of Court below, Page 6)

The case relied on by the Plaintiff is *Cantley & Tanzola, Inc. v. United States,* 115 F. Supp. 72, (S. D. Cal.). It does not necessarily follow that in each case presented before the Commission a substantial interest of national defense is involved. In the Cantley & Tanzola, Inc. case "the context of the situation presented" specifically raised a primary issue to the question of national defense. The case did not involve the issuance of a certificate based on proof of public convenience and necessity. It did involve reduced rates proposed by railroads to block efforts to construct a petroleum pipe line. It was claimed that the lower rates, if allowed to go into effect, would be so destructive as to eliminate motor carriers, and result in railroads being the only carrier to remain in the field. The issue of preserving motor and rail carriers was directly in issue. In Cantley & Tanzola, Inc. cited supra, the Court stated, (Page 80)

"• • • Expert knowledge of transportation problems is not required to envisage the probable desirability of having at least one alternative method of transporting the 'large surplus' of Texas oil to the Pacific coast to serve urgent, possibly vital, needs of national defense."

In the present case, no issue of complete elimination of any one type of carrier is involved. There was a claim of diversion of traffic from one water carrier to another, and the Commission passed properly upon the issue of such diversion and effect of such diversion on the existing water carriers, including the Plaintiff.

(D)—*There Is No Inconsistency in the Commission's Decision in the Isbrandtsen Case with the Decision in the West Coast Trans-Oceanic Case.*

The Plaintiff attacks the order of the Commission claiming that "the Commission's order was arbitrary and capricious in that it contained manifest inconsistencies when compared with the companion case (West Coast Trans-Oceanic Steamship Line, Common Carrier Application I. C. C. Docket No. W-1019)".

The order of the Commission in the West Coast Trans-Oceanic Steamship Line case was not inconsistent, and was based on an entirely different set of facts and presented an entirely different issue. As found by the lower court:

> "East coast applied for a certificate for intercoastal traffic generally, but the Commission, finding no need for additional west bound tonnage, denied the application because it was not shown that West Coast could operate profitably in east bound trade alone." (Decision of Court below, Page 8)

In Coyle Lines Incorporated v. United States cited supra, the Court stated: (Page 278)

> "• • • Plaintiffs contend that the Commission's decision in the Commercial Barge Lines case leaves no doubt that the Commission's purpose in giving Gulf-Canal authority to operate in barge-load quantities was to support the economically unfeasible less than barge-load service now being offered by Gulf-Canal under its existing certificate."
>
> "• • • It may be that the findings of the Commission in the case at bar appear inconsistent with its findings in the *Commercial Barge Lines case.* However, as said by Mr. Justice Brandeis in *Virginian Railroad v. United States,* 272 U. S. 658, 666, 'This court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclu-

> sion or with the alleged inconsistency with findings made in other proceedings before it.' So long as there is substantial evidence in this record taken as a whole to support the conclusion that the public convenience and necessity require the issuance of a certificate to Gulf-Canal covering less than bargeload as well as bargeload quantities, no further inquiry need or should be made. We have examined the record as a whole and we find substantial evidence to support the Commission's action."

There is, however, no inconsistency in the Commission's order in the instant case; for, as held by the District Court in this action when referring to Plaintiff's contention of inconsistency in the West Coast Trans-Oceanic case, "An attempt is made to prove this by extracting phrases from that order and attaching undue significance to them, but a report of the Commission must be read as a whole. • • • The position of Isbrandtsen is clearly distinguishable in view of its proposal to use its ships now in round the world trade to carry on the eastbound service." (Decision of Court below, Pages 8-9)

Conclusion

The decision of the Commission indicates on its face that the Commission did consider each and every issue presented. The Commission stated: "We have heard the parties in oral argument. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified." The Commission is not required to make detailed and atomized findings of each and every collateral issue raised.

The Commission, having made its ultimate findings required by law, within the context of the situation presented, that (a) the Applicant is fit, willing and able to per-

form the proposed service, (b) that the service will serve the public convenience and necessity, and

Having set forth the basis on which it arrived at its conclusion, and

Having given consideration to all issues presented before it,

It is respectfully claimed that the Commission's order is valid.

For the reasons herein stated, we respectfully believe that the questions represented by Plaintiff's appeal are so unsubstantial as not to require further argument, and respectfully pray that the appeal of the Plaintiff be dismissed and that the decree and judgment of the District Court be affirmed.

Respectfully submitted,

PAUL J. GOLDSTEIN,
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Attorneys for New Haven Chamber of Commerce.

April 5, 1954.

94

APR 13 1954
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 685

LUCKENBACH STEAMSHIP COMPANY, INC.,
Appellant,

against

UNITED STATES OF AMERICA, ET AL.

STATEMENT BY APPELLEE, PARR RICHMOND TERMINAL CO., INTERVENOR, IN SUPPORT OF ISBRANDTSEN CO., INC., MOTION TO AFFIRM

By an order heretofore entered herein, Parr Richmond Terminal Co. was granted leave to intervene herein because of the public interest of Port Richmond, San Francisco Bay.

Intervenor is a corporation engaged as operator of the Port Richmond, California, terminal facilities. As such it operates docks, wharves and other terminal structures under a lease with the City of Richmond, as owner, which lease imposes upon intervenor the burden of conducting the said terminal facilities for the best interests of commerce and the public of Port of Richmond.

The facilities include four separate terminals efficiently located on the waterfront with 5,350 feet of berthing space for large deep draft vessels on a government maintained

channel of 32 foot depth at average stages of the tide These facilities are equipped with modern docks and sheds with complete terminal facilities for carloading and unloading and dockside cranes for heavy lifts and facilities for the handling of bulk cargoes of all kinds ranging from case goods to locomotives.

It will be noted from the map of the area attached thereto that the Port of Richmond is on the east side of San Francisco Bay directly opposite the Golden Gate and serves without transshipment, the fruit, agricultural and manufactured production and shipping from the Alameda, Contracosta, Salerno, Napok and Sonoma Valleys, which include the major cities of Stockton and Sacramento.

Heretofore service to the Port of Richmond has been inadequate. The granting of the certificate of additional service to the Isbrandtsen Company by the Commission which was sustained in the District Court has opened the way for adequate, regular and dependable intercoastal service from Port Richmond, which the public interest of Port Richmond requires. Any reversal of the decision of the Interstate Commerce Commission or of the District Court in this case would be to deprive the Port of Richmond of that benefit.

The Commission's findings are supported by substantial evidence and establish the public need for the extra intercoastal service to Port Richmond and should be sustained here.

It is respectfully submitted that the judgment of the District Court should be sustained and the motion herein to affirm should be granted.

Dated: April 5, 1954.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 685

LUCKENBACH STEAMSHIP COMPANY, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ISBRANDTSEN COMPANY, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM ON BEHALF OF ISBRANDTSEN COMPANY, INC., APPELLEE

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INDEX

Subject Index

	Page
Motion to affirm on behalf of Isbrandtsen Company, Inc.	1
I. Jurisdiction	2
II. Question presented	2
III. Statutes Involved	2
IV. Statement of the case	3
The Administrative Proceedings	3
The Administrative Findings and Decision	4
V. The opinion below	6
VI. Argument	8
1. The "National Defense" factor was not a material issue before the Commission	8
2. The Commission made wholly adequate findings concerning the competitive effect upon existing carriers	12
3. No issue concerning rate practices in foreign trade was relevant in this certificate proceeding	14
4. No substantial question is presented by the asserted inconsistency between the administrative decisions in this case and the WCTO case	15
Conclusion	16

Table of Cases Cited

A.B.&C. Motor Co. v. *United States*, 69 F. Supp. 166, 169 (D.C. Mass. 1946)	14
Alabama Great Southern R. Co. v. *United States*, 340 U.S. 216, 288	7
Coyle Line, Inc. v. *United States*, 115 W. Supp. 272, 278 (D.C. E.D. La., 1953)	14

Page

Isbrandtsen Co., Inc., Common Carrier Application, 285 I.C.C. 369, 378, 379 ..... 4, 6
Mississippi Valley Barge Line v. *United States*, 292 U.S. 282, 286-287 ..... 7, 13
United States v. *L. A. Tucker Truck Lines*, 344 U.S. 33, 36, 37 ..... 9, 10
Virginia Railroad Co. v. *United States*, 727 U.S. 658, 666 16
West Coast Trans-Oceanic Steamship Line Application, 285 I.C.C. 381 (Statement, pp. 21-23) 15

STATUTES AND OTHER AUTHORITIES CITED

Administrative Procedure Act, (5 U.S.C. 1007 (b)), Section 8 (b) 3
Interstate Commerce Act, 49 U.S.C.A. Note preceding Section 1 2
Interstate Commerce Act, Section 14 (1), 49 U.S.C. 14 (1) 7
Interstate Commerce Act, Sections 305-307, 49 U.S.C. §§ 905, 907 14
Interstate Commerce Act, Section 309 (c), 49 U.S.C. 909 (c) 2
Interstate Commerce Commission, Rules of Practice, 49 C.F.R., Ch. 1, § 1.101 (b) 9
Interstate Commerce Commission, rule, entitled "Reconsideration", Rule 101 (d), 49 C.F.R., Ch. 1, § 1.01 (d) 9
United States Code, Title 28, Section 1253 2
United States Code, Title 28, Sections 2325 & 2284 ... 2

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 90-130

LUCKENBACH STEAMSHIP COMPANY, INC.,
Plaintiff-Appellant,

against

THE UNITED STATES OF AMERICA, ET AL.,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM ON BEHALF OF ISBRANDTSEN COMPANY, INC., DEFENDANT-APPELLEE

On March 22, 1954, the District Court for the Southern District of New York granted the Luckenbach Steamship Company, Inc. permission to appeal to the Supreme Court of the United States from an order of said court dated January 29, 1954, which dismissed an action by Luckenbach Steamship Company to enjoin an order of the Interstate Commerce Commission granting an intercoastal certificate of public convenience and necessity to the Isbrandtsen Company. This motion to affirm, on the ground that the questions presented by such appeal are so insubstantial as not to

need further argument, is made pursuant to Paragraph 3 of Rule 12 and Paragraph 3 of Rule 7 of the Rules of the Supreme Court of the United States.

I. Jurisdiction

This appeal is taken from the judgment of a 3-judge district court, convened pursuant to 28 U. S. C. §§ 2325 and 2284. The Supreme Court is granted jurisdiction to review the judgment by 28 U. S. C. § 1253.

II. Question Presented

Whether a substantial question, warranting review by this Court, is raised by the lower Court's decision which approved an intercoastal certification order of the Interstate Commerce Commission and rejected as insubstantial the claim that the Commission had failed to pass on issues material to its decision.

III. Statutes Involved

1. Section 309(c) Interstate Commerce Act, 49 U. S. C. 909(c):

> "Subject to section 310 [not here applicable], upon application as provided in this section the Commission shall issue a certificate to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if the Commission finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied."

2. National Transportation Policy, Interstate Commerce Act, 49 U. S. C. A. Note preceding Section 1:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

3. Section 8(b) Administrative Procedure Act, 5 U. S. C. 1007(b) (in pertinent part):

"All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) *findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record;* and (2) the appropriate rule, order, sanction, relief or denial thereof."

IV. Statement of the Case

The Administrative Proceedings

On December 3, 1951, Isbrandtsen Company, Inc. (Isbrandtsen), Intervenor-Defendant below, filed an application with the Interstate Commerce Commission (Commis-

sion) for a certificate of public convenience and necessity to serve the eastbound intercoastal trade from ports on the Pacific Coast to ports on the Atlantic Coast under Section 309(c) of the Interstate Commerce Act.

Extensive hearings before a Commission Examiner were held in New York, New York, Washington, D. C., and San Francisco, California. At these hearings testimony of the more than 30 independent, non-carrier witnesses representing shippers, chambers of commerce, port organizations and other non-carrier interests, was without exception to the point that the existing service was inadequate to meet the needs of east-bound traffic and that there was a necessity for additional service. In substance, the testimony conclusively established the urgent public need for additional eastbound service, particularly during the peak season months of August through September. These independent witnesses were unanimous in supporting the application for the proposed Isbrandtsen service. Even the single non-carrier Luckenbach witness, who appeared in behalf of the Port of New York Authority, testified that at least a 50 percent increase in existing service eastbound was needed.

The Administrative Findings and Decision

On the basis of the evidentiary complex thus developed on the record, the Commission made the following findings (*Isbrandtsen Co., Inc., Common Carrier Application*, 285 I. C. C. 369, 378, 379):

> 1. "The evidence is convincing that there is need for applicant's proposed regular fortnightly service during the period August through February in the transportation of commodities generally.
>
> 2. "The evidence is convincing that the Korean war is not a controlling factor with respect to inadequacy of service furnished by the certificated carriers during the peak season.

3. "In order to place more ships in the eastbound service during the period of heavy eastbound tonnage, there must be sufficient westbound tonnage to provide a return trip with a satisfactory revenue return. It is evident that the lack of westbound cargo was a major reason for the unprofitability of increased service attempted by two of the protestants. Since there appears to have been a substantial eastbound tonnage (general cargo, including lumber) available for the added ships during the period of their operations, it is apparent that lack of westbound cargo had a material effect on the decision of the protestants to withdraw the added ships from the trade. . .

"Since the unbalance in eastbound and westbound volume of cargo will undoubtedly continue into the foreseeable future, any improvement in intercoastal service will have to be accomplished by service of the nature proposed by applicant" (i. e., eastbound service only).

4. "It is evident that the proposed service will not increase to any appreciable extent the volume of traffic moving in intercoastal service. If the proposed service is authorized, applicant would necessarily have to share some of the existing traffic with the certificated carriers. Although some of the latter carriers would suffer a loss of traffic, the shippers would gain more frequent service or at least a greater amount of cargo space for which they have shown there is a need during the period August through February."

As these constitutive findings make plain, the Commission's problem was to find a means of supplying additional *eastbound* cargo space without overloading the already over-supplied *westbound* trade. No existing intercoastal carrier could be induced to put on more eastbound tonnage because of inability to obtain profitable return loads.

Under these circumstances, the proposed Isbrandtsen service, eastbound only as a leg of a round-the-world route, supplied the prefect solution to the Commission's dilemma.

Accordingly, the Commission made the ultimate finding "that the present and future public convenience and necessity require operation by the applicant as a common carrier by water" (285 I. C. C. at 379). To tailor the certificate to the need demonstrated on the record, the Commission granted, in principal part, (1) a general intercoastal certificate restricted to the months of August through February and (2) an unrestricted certificate to serve the ports of New Haven, Connecticut and Port Richmond and Port Hueneme, California (*Ibid.*).

The initial report and order of the Commission was rendered by Division 4 of the Commission on September 10, 1953. On petition for reconsideration, the full Commission affirmed the report and order of Division 4. Thereafter, Luckenbach instituted this action in the District Court for the Southern District of New York to enjoin and set aside both the initial order of Division 4 and the order denying the petition for reconsideration. Because the Commission's order was to go into effect December 28, 1953, a restraining order was granted by Judge Kaufman on December 21, 1953, pending a hearing and determination of the action by a three-judge court. After hearing was had and briefs were filed, that Court, on January 29, 1954, denied the request for an injunction and dismissed the complaint.

V. The Opinion Below

The opinion of the lower court is not yet reported. In the Court below, as in this Court, Luckenbach conceded that there was adequate basis in the record to support the ultimate findings made by the Commission (1) that there was a public need for the service and (2) that Isbrandtsen was fit, willing and able to respond to that need. Below, as here, petitioner challenged the validity of the Commission's order on the sole ground that the Commission failed to give

proper consideration to certain allegedly material issues tendered by petitioner (Statement, Appendix A, p. 26).

In essence, the Court below found that the record amply supported the Commission's decision and that the Commission had given adequate consideration to every issue material to its determination which had been properly tendered to it. Speaking through Hand, J., the Court decided that the essential basis of the Commission's order sufficiently appeared in the report so that the Court could satisfy itself that the Commission had performed its function. Having so found, the Court adhered to the principle so often expressed by this Court that "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line* v. *United States,* 292 U. S. 282, 286-287.

Noting that Section 14(1) of the Interstate Commerce Act, 49 U. S. C. 14(1), does not require the Commission to make detailed findings of fact except in a case where damages are involved, the Court held that Section 8(b) of the Administrative Procedure Act did not require the Commission "to discuss each consideration expressed in the National Transportation Policy regardless of its materiality to the decision it renders" (Statement, Appendix A, p. 27). Judge Hand relied upon *Alabama Great Southern R. Co.* v. *United States,* 340 U. S. 216, 288, for the proposition that "the basic findings essential to the validity of a given order will vary with the statutory authority invoked and the context of the situation presented", and he found that the Commission's decision reflected a rational treatment of every issue material to its decision. He said "it was for the Commission to decide whether the granting of the certificate in such a case is in the public interest" (*Id.,* pp. 27, 29).

VI. Argument

As we show hereinafter, the record on its face discloses that the Commission considered and resolved in its report every issue material to the proceeding before it. The case presents no substantial question concerning either construction of the Interstate Commerce Act or the meaning of Section 8(b) of the Administrative Procedure Act. There is no conflict in the decisions of lower courts which this Court must reconcile.

Appellant maintains that the Commission failed to make findings concerning (1) the impact upon national defense of a grant to Isbrandtsen; (2) the effect of Isbrandtsen competition upon existing carriers; (3) possible unfair competition arising from the fact that the Isbrandtsen Company also engaged in foreign trade. In addition, the Commission's decision in this case is challenged as allegedly inconsistent with a preliminary decision by the Commission in another case. The Court below correctly found that (1) the Commission was not required to make a finding as to national defense on this record; (2) that there was in fact no inconsistency in the decisions of the Commission; and (3) that fully adequate findings were made on the other issues.

The decision below was clearly correct and should be affirmed by this Court without further proceedings.

1. *The "National Defense" factor was not a material issue before the Commission.*

There is no reason to disturb the Commission's decision because of its omission to refer expressly to Appellant's belated attempt to inject an issue concerning the national defense. The lower Court correctly ruled that "the record here discloses that the issue of national defense was not raised below" (Statement, Appendix A, p. 28). During the

hearing, Appellant presented no evidence whatever on this subject. Nor did it seek rehearing or a further hearing to present such evidence, as permitted by Rule 101 (b) of the Rules of Practice of the Interstate Commerce Commission, 49 C. F. R., Ch. 1, § 1.101(b).[1] Appellant grounds this phase of its appeal exclusively upon a belated reference to the subject by way of its "Petition for Reconsideration" before the Agency (Statement, Appendix B, p. 31). The insubstantiality of the claim that a "material issue" requiring explicit discussion was thereby raised is apparent from a glance at the pertinent rule of the Commission, entitled "Reconsideration". Rule 101(d), 49 C. F. R., Ch. 1, § 1.101(d). That rule reads:

> "*Reconsideration.* If relief under this section other than under paragraphs (b) [i.e., "Rehearing or further hearing] and (c) [i.e., Modification of effective date] is sought, *the matters claimed to have been erroneously* decided and the alleged errors or relief sought must be specified. . . " (emphasis supplied).

The context of this rule makes plain that it contemplates and requires reference to issues already raised and adjudicated in the previous administrative proceedings. In this case Appellant had failed to present any evidence on the national defense matter in the original hearing and had not even requested a further hearing for that purpose under Rule 101(b) Note 1 *supra*. Consequently, there was nothing for the Commission to *reconsider* concerning that matter. In this procedural setting, the appeal on the national defense ground is controlled by *United States* v. *L. A. Tucker*

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[1] Rule 101(b) reads as follows:

"(b) ***Rehearing or further hearing.*** When in a petition filed under this section opportunity is sought to introduce evidence, the evidence to be adduced must be stated briefly, such evidence must not appear to be cumulative, and explanation must be given why such evidence was not previously adduced."

Truck Lines, 344 U. S. 33, where this Court said (344 U. S. at 36, 37):

> " . . . The issue is *clearly an afterthought* brought forward at the last possible moment to undo the administrative proceedings . . .
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> * * * * *
>
> " . . . Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against *objection made at the time appropriate under its practice*" (emphasis supplied).

The record shows, moreover, that on the merits there is no substance in the claim that the national defense factor was a material issue in this case and that the Commission's findings were insufficient to dispose of the matter even as belatedly injected by Appellant in its "Petition for Reconsideration". Appellant's claim concerning the alleged disregard of the national defense in certificating Appellee for eastbound intercoastal service was as follows (Statement, Appendix C, p. 46):

> "The utilization by Isbrandtsen of domestic operating rights as a segment of a long-haul foreign-trade operation eliminates one of the basic defense objectives of the intercoastal trade—namely, to maintain in home waters sufficient available tonnage in the event of an emergency. To *substitute* for vessels devoted to intercoastal trade, vessels which are operating as only a segment of a long-haul operation would be a radical departure from the basic defense objectives of the National Transportation Policy" (emphasis supplied).

That the claim is immaterial here is plain from the fact that certification of Appellee for eastbound service did

not "substitute" Appellee's vessels for any others. This case does not concern a situation in which Appellant is offering to perform the same service as Appellee proposed, but with additional vessels which will engage solely in intercoastal trade. Nor did Appellant's Petition for Reconsideration suggest that the effect of the decision would be to force a reduction in the number of its vessels engaged in intercoastal service. If anything, the effect of the certification of Appellee was to provide for the availability of *additional* tonnage in home waters at the times when Appellee's vessels were servicing the intercoastal trade. Thus, the facts here revealed that unless Appellee was certificated nobody would furnish the service it proposed, as was expressly recognized in the following findings of the Commission (285 I. C. C. at 378):

> "Attempts have been made by some of the protestants to add additional vessels to their intercoastal service during and since 1950. These ventures proved unsatisfactory from a revenue standpoint *and the added ships were removed from the trade.* Some of the protestants state that they are ready to increase the number of ships in this trade whenever they believe that the ships now in this service are not providing adequate cargo space. Since there appears to have been a substantial eastbound tonnage (general cargo, including lumber) available for the added ships during the period of their operation, it is apparent that the lack of westbound cargo had a material effect on the decision of the protestants to withdraw the added ships from the trade.
>
> • • • • •
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> " . . . It is evident that the lack of westbound cargo was a major reason for the unprofitability of the increased service attempted by two of the protestants. Since the unbalance in eastbound and westbound volume of cargo will no doubt continue into the foreseeable

future, *any improvement in intercoastal service will have to be accomplished by service of the nature proposed by the applicant.*" (emphasis supplied).

In short, for both procedural and substantive reasons, the record on its face amply supports Judge Hand's rejection of Appellant's national defense argument. As he said (Statement, Appendix A, p. 28):

> " . . . Nor is it clear that there is any substantial interest of national defense involved or violated. The need for the proposed service was established and in the 'context of the situation presented' we do not think an affirmative discussion of national defense was necessary to validate the order."

2. *The Commission made wholly adequate findings concerning the competitive effect upon existing carriers.*

Contrary to Appellant's assertion, the Commission took express cognizance of "the present financial plight of the intercoastal trade" (Statement, p. 10). Thus, its findings included the following recital (285 I. C. C. 369, 377):

> "American-Hawaiian, Luckenbach, Pope & Talbot, and Arrow Line adduced evidence in opposition to applicant's proposed service. In support of their position they show low earnings or deficit operations for the period since World War II . . . "

And the lower Court correctly ruled that the Commission's findings amply covered the impact of the certification of Appellee upon existing carriers. In the Court's words (Statement, Appendix A, p. 28):

> "As to the detrimental effect on existing carriers, we think the Commission in its order clearly did pass on this issue. It recognized that: 'If the proposed service is authorized, applicant would necessarily have to share some of the existing traffic with the certificated carriers. Although some of the latter carriers would

suffer a loss of traffic, the shippers would gain a more frequent service or at least a greater amount of cargo space, for which they have shown there is a need during the period of August through February.' Furthermore, in restricting the proposed service to peak periods, sharply limiting the ports to be served by year round service, and limiting the products that can be carried from ports in the northwest, the Commission has shown that it gave due consideration to the position of existing certificated carriers. A decrease in revenue or sharing of existing tonnage will not of itself defeat an application. Where, as here, it is shown that the proposed service will serve the needs of the public, and the transportation system, then the application may be granted."

What the Commission did was to weigh the needs of the shippers against the revenue requirements of the existing carriers, as it is required to do by the statute. The National Transportation Policy is not limited to encouraging "sound economic conditions among the several carriers", but declares as its ultimate objective the development of a "national transportation system . . . adequate to meet the needs of the commerce of the United States." The Commission must of necessity balance the needs of shippers for service against the revenue requirements of carriers whenever it is faced, as here, with an application for certification opposed by existing carriers. That is what it did here and, in the light of the evidence before it, the decision to issue the certificate is unassailable. In such circumstances its adjudication clearly had the requisite "rational basis" precluding judicial interference. As the lower Court recognized (Statement, Appendix A, p. 29): "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286-287.

The real complaint of Appellant is not that the Commis-

sion's decision ignored the standards of the National Transportation Policy, but that it threatened to prevent Appellant from acquiring a vested interest in the existing traffic. However, Appellant is clearly in error in assuming that "carriers initially in a field are immune against additional and competitive carriers in the face of public convenience and necessity" for additional service. *A.B.&C. Motor Co.* v. *United States,* 69 F. Supp. 166, 169 (D. C. Mass. 1946). The question of the impact of the Commissioner's order on Appellant, as an existing carrier, therefore, presents no substantial question warranting further consideration by this Court.

3. *No issue concerning rate practices in foreign trade was relevant in this certificate proceeding.*

The contention that a material issue concerning unfair competition was neglected is transparently superficial. According to Appellant, the Examiner improperly excluded evidence of Isbrandtsen's rate practices in foreign trade which might have had some material bearing on Isbrandtsen's future intercoastal rate practices (Statement, pp. 2, 6). But foreign trade rate practices are not relevant in an intercoastal certificate proceeding for the simple reason that the Interstate Commerce Act provides a complete but separate regulatory scheme for the control of all aspects of intercoastal rate making. (Sections 305-307, 49 U. S. C. §§ 905, 907).

Under the Act, intercoastal carriers must file their rate schedules with the Commission 30 days prior to their effective date. Appellant may then lodge a timely complaint with the Commission. *Coyle Line, Inc.* v. *United States,* 115 F. Supp. 272, 278 (D. C. E. D. La., 1953). In other words, the Commission is fully empowered to prevent rebates and other unfair competitive practices in intercoastal trade.

That the Commission was well aware of the distinction between unregulated foreign rate practices and regulated intercoastal rate practices is clearly reflected by its decision. As Judge Hand observed (Statement, Appendix A, p. 29):

> "The charge of unfair competition also seems clearly to have been considered by the Commission. * * * Thus, it is clear that the Commission weighed the need for the services against the possibility of unfair competition and found that with the limitations of the certificate and the close regulation which accompanies the receipt of such approval, the public convenience and necessity would be served by permitting the proposed service. This has been done before. * * * Moreover the record here shows that there are other carriers in the intercoastal trade who are at present engaged in foreign trade. There is no evidence to show that this has resulted in unfair competitive practices."

4. *No substantial question is presented by the asserted inconsistency between the administrative decisions in this case and the WCTO* case.

The opinion below demolishes Appellant's elaborate effort to build an issue for this Court on the claim that that Commission inexplicably reached different results in this case and the companion case of *West Coast Trans-Oceanic Steamship Line,* 285 I. C. C. 381 (Statement, pp. 20-22). As Judge Hand observed, the vital distinction was that Appellee here sought and was in a position profitably to service only the under-tonnaged *eastbound* service, whereas WCTO applied for and was dependent upon entry into the oversupplied *westbound* trade as well. In the words of the Court (Appendix A, p. 30):

> "The plaintiff's final claim is that the findings of the Commission are arbitrary and capricious because they are inconsistent with those made in West Coast Trans-Oceanic Steamship Line Common Carrier Application,

Docket No. W-1019 (September 9, 1953). An attempt is made to prove this by extracting phrases from that order and attaching undue significance to them, but a report of the Commission must be read as a whole. Newtex S. S. Corp. v. United States, *supra.* West Coast applied for a certificate for intercoastal traffic generally, but the Commission, finding no need for additional westbound tonnage, denied the application because it was not shown that West Coast could operate profitably in eastbound trade alone. In the words of the Commission: 'we are convinced that without authority to operate its ships in westbound service, any attempt to perform eastbound service only would prove unsuccessful and should be denied.' The position of Isbrandtsen is clearly distinguishable in view of its proposal to use its ships now in round the world trade to carry on the eastbound service."

Apart from the fact that the results are entirely consistent, Appellant could not complain even if they were irreconcilable. As Mr. Justice Brandeis stated in *Virginia Railroad Co.* v. *United States,* 727 U. S. 658, 666:

> "This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, *or with the alleged inconsistency of the findings made in other proceedings before it.*" (Emphasis supplied.)

Conclusion

Appellant's Statement conceded, at p. 2):

> "The report of the Interstate Commerce Commission appears reasonable and intelligible on its face. It is not Luckenbach's position that the Commission failed to make findings of fact or that it failed to give rational reasons for its action."

And, as shown above, the Commission's report treats and disposes of every issue material to the proceeding. It fol-

lows that the decision of the Court below should be affirmed without further proceedings.

Respectfully submitted,

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